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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Mediation Board lawfully may insist that a union first waive its statutory right to strike before it may make use of the dispute resolution procedures available under Section 5, First of the Railway Labor Act, 45 U.S.C. § 155, First.

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PETITION FOR A WRIT OF CERTIORARI

The International Association of Machinists and Aerospace Workers hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia in International Association of Machinists and Aerospace Workers, D.C. Cir., No. 90-5201 (April 12, 1991, amended April 29, 1991).

OPINIONS BELOW

The Court of Appeals' Memorandum Opinion of April 12, 1991, as amended April 29, 1991 is reproduced in the Appendix ("App.") to this petition at pp. 1a-10a. The opinion of the Court of Appeals is reported at 930 F.2d 45. The judgment of the Court of Appeals is reproduced at App. 10a. The District Court's Order dated June 29, 1990 is reproduced at App. 11a. The District Court did not issue a written opinion and its order is unreported.

JURISDICTION

The decision of the Court of Appeals was rendered on April 12, 1991 and amended on April 29, 1991. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

This case arose out of a bargaining dispute under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, between the plaintiff International Association of Machinists and Aerospace Workers ("IAM" or "the Union") and the nation's rail carriers. The National Mediation Board ("NMB" or "the Board") had taken jurisdiction of the dispute after its mediation processes had been invoked by the parties. See, 45 U.S.C. § 155, First. When the NMB's efforts to mediate a resolution of the dispute proved unsuccessful, the NMB nevertheless declined to terminate the process and release the IAM to the succeeding steps set forth in the RLA. The IAM filed suit challenging the NMB's requirement that the union relinquish its statutory right to strike as a condition for moving the dispute beyond the mediation stage. The district court had jurisdiction over this claim pursuant to 28 U.S.C. §§ 1331, 1337, and 1361.

The District Court refused IAM's request for injunctive relief and dismissed the complaint by order dated June 29, 1990. App. 11a. This ruling was based on the allegations in the complaint supplemented by affidavits and exhibits filed in support of and in response to the IAM's motion; no evidentiary hearing was held. The Court of Appeals affirmed the District Court's order. App. 1a-10a.

B. Statement of Facts

The IAM has been engaged in multi-employer bargaining over a new collective bargaining agreement with the nation's rail carriers since April 1988. The National

Mediation Board has held the parties in mediation under Section 5 of the RLA since October 13, 1988. The Board has conducted mediation sessions on numerous occasions through assigned mediators and the Chairman of the agency. Until March 1990, these sessions were conducted jointly with all labor organizations and carriers in the industry involved in what is called "national handling". In February 1990, the Chairman of the Board, who personally was acting as chief mediator, openly admitted to the parties that the Board's mediatory efforts had failed.

Thereafter the NMB tried to convince the parties to agree upon a procedure whereby the Board would release them from mediation and proffer arbitration, and the President of the United States would appoint an emergency board to make recommendations regarding settlement of the dispute. By statute, after an emergency board's recommendations are considered, the parties are free to engage in economic self-help, including the right to strike. Under the NMB's proposal, however, the unions were to agree to suspend their right to strike until at least October 15, 1990, and then not exercise the right unless Congress was in session.

The IAM refused to agree to waive its right to strike in this manner and requested that the Board follow the procedure set forth in the Act instead and honor its statutory obligation to proffer arbitration in accordance with Section 5 of the Act, giving the union the right to strike after all statutory procedures were exhausted. The Board advised the IAM that unless it agreed to the aforesaid extra-statutory procedure, no proffer would be forthcoming.[1] Absent a proffer under the Act, the status quo

[1] The IAM presented undisputed evidence that it was told by the Chairman of the NMB that he had discussed the matter with officials in the White House and was told that an emergency board would not be created in this dispute unless the union accepted the conditions being placed on the termination of the mediation stage. He also said that without White House concurrence to appoint an emergency board, he did not think the NMB would release the parties from mediation. See, App. 6a.

remains in place and neither party may engage in economic self-help. The carriers and other unions did agree to the NMB's conditions and the Board proffered arbitration to them in their disputes. IAM did not. Its dispute, therefore, remains stalled in the mediation stage.

IAM filed its complaint challenging the NMB's conduct on April 25, 1990. Following a hearing on IAM's motion for preliminary and permanent injunctive relief and on NMB's motion to dismiss, the District Court issued an order finding that the union "has failed to state a claim of patent official bad faith against [the Board] concerning the continuation of mediation for [IAM]'s labor dispute." App. 11a. The union appealed.

In an opinion dated April 12, 1991, and amended April 29, 1991, the Court of Appeals affirmed the district court's ruling. It sustained the NMB's conduct on the premise that "[c]lose judicial review of the NMB's subtle, yet necessarily freewheeling, methods could cripple the agency". App. 6a. It found itself unable to conceive that "this mixed adjudicatory-mediation scheme" was outside the Board's authority, though "[j]ury-rigged it may be." *Id.* The lower court refused to place "any legal significance" on the admission by the Chairman of the agency that mediation had failed, characterizing it as possible "blarney (hoomalimali in Hawaiian)", the true meaning of which it found to be beyond judicial inquiry. App. 8a. Applying a standard of "patent official bad faith", the Court of Appeals upheld the NMB's highly unusual conduct. App. 6a-9a.

REASONS FOR GRANTING THE WRIT

This Court has not had occasion to set a standard against which the Mediation Board's conduct of the mediation process is to be weighed. It has however considered the "major dispute" process, of which mediation is a part, on numerous occasions. See, *Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 (1969);

Chicago & N. W. R. Co. v. Transportation Union, 402 U.S. 570 (1971); *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429 (1987); *TWA, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989). Each of these decisions confirms the intent of the RLA that once the mediation process has run its course, the parties' respective rights to resort to self-help are guaranteed by the Act. Most recently, the Court expressed its understanding that "judicial intervention in RLA procedures [is] to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act.'" *TWA, Inc., supra* at 441, quoting *Switchmen v. National Mediation Board*, 320 U.S. 297, 300 (1943). In *TWA* the Court reiterated its approval of the concept that "the duty to exhaust the dispute resolution procedures 'does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties to resort to self-help.'" *TWA, supra* (citation omitted). "The availability of self-help measures rather than judicial remedies 'may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures.'" *Id.*, quoting *Burlington Northern, supra* at 451-452.

The RLA major dispute resolution process has five parts: the serving of proposals to change existing agreements, 45 U.S.C. § 156; conferences and direct negotiations between the parties, *Id.*; mediation by the NMB, 45 U.S.C. § 155; proffer of arbitration, *Id.*; arbitration if mutually agreed or termination of mediation, and, finally, resort to economic self-help, *Id.* In the absence of arbitration, the President may create an Emergency Board to assist in the resolution of the dispute. 45

U.S.C. § 160. "While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§ 2 Seventh, 5 First, 6, 10 [45 U.S.C. § 152, Seventh, § 155, First, § 156, § 160]." *Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 378 (1969). Accord: *Detroit and Toledo Shore Line R. Co. v. UTU*, 396 U.S. 142, 150 (1969).

This process is universally recognized as long and drawn out, but it is not endless. See, *Detroit and Toledo Shore Line R. Co. v. UTU, supra* ("[T]he exhaustion of the Act's remedies [is] an *almost* interminable process.") (Emphasis added). "It does some time come to an end." *Delaware and Hudson Railway Co. v. UTU*, 450 F.2d 603, 608 (D.C. Cir. 1971).

Once mediation is invoked, the NMB becomes the policeman of the process. The RLA vests the NMB with the authority to hold carriers and unions in mediation until its efforts to bring about a mediated settlement prove unsuccessful. The Act places no time limits on mediation and leaves the determination when impasse has been reached to the Board. Once that determination is made, however, the statute mandates that the Board proffer arbitration; if arbitration is rejected, the Board must notify the parties that its mediatory efforts have failed. The Board's *sole remaining function* at that point is to advise the President whether, in the Board's judgment, the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." 45 U.S.C. § 160. The President "may thereupon, in his discretion, create a board to investigate and report respecting such dispute." *Id.* The appointment of an emergency board defers, but does not eliminate the right to strike. Should such a board be appointed, its' recommendations are non-binding; if they do not form the basis for a settlement the parties are free to resort to self-help thirty days after the recommendations are issued. *Id.*

Thus, the Act contemplates that the Board's determination whether its mediatory efforts have failed be based on the success its participation in the process has generated in leading the parties to an agreement. Crucially, the Act does not require the parties to reach agreement in mediation; it only requires that they subject themselves to the Board's jurisdiction in the hope that a settlement can be facilitated. If the Board's efforts prove unsuccessful, the Board's only alternative is to proffer arbitration. Congress specifically left the decision as to whether further governmental intervention is warranted after that to the President and the President alone. And even if an emergency board is appointed, after it recommends a settlement, either party may reject the recommendation. The process ends with the right to strike, a right protected by the statute itself.

What happened here is that the Board turned the statutory process on its ear. The Chairman of the Board, who conducted the mediation, told the parties that mediation had failed to bring about an agreement. At that point, the Board should have proffered arbitration and let the statutory process run its course. If arbitration was rejected, then the Board could have notified the President of the threat the dispute posed to interstate commerce, as the statute contemplates.

Instead, the Chairman went directly to the White House to inquire under what conditions the President would create an emergency board. Then, without regard to the admitted failure of the Board's mediatory efforts, the Board decided that it would not terminate mediation unless the President would appoint an emergency board. The Board demanded that the parties meet the President's requirements for appointment of an emergency board as the price for a release from mediation. Those who paid the price reaped the reward of a proffer of arbitration. The IAM did not, and the Board continues to hold it hostage.

In this case, the NMB asserted its power *not* to bring about a contract settlement but instead to prevent the IAM from freely exercising statutorily-protected self-help measures because the union refused to waive rights Congress granted it in the RLA. The undisputed facts before the District Court revealed that the Mediation Board refused to terminate mediation *not* because some glimmer of hope existed that continued mediation might generate a settlement, but instead because the union would not waive its right to strike.

The NMB Chairman unashamedly admitted that the union's refusal to waive its statutory rights, rather than accept the process demanded by the Board, formed the basis for the Board's action. The Court of Appeals found this to be an acceptable tactic for a mediator to use to pressure a settlement because the RLA "nowhere defines mediation" (App. 7a). This definitional omission, however, cannot properly be viewed as a conscious grant to the agency of unrestricted license to ransom the Act in its efforts to generate a settlement. Unfortunately, this is just what the Circuit Court's decision accomplishes. In sum, this is not a case in which a party to a labor dispute is challenging the Board's exercise of discretion; rather, here the Board has decided to *refuse* to act unless and until the union agrees to waive its statutory right to strike.

The lower court's ruling gives the NMB unbridled power over parties in a labor dispute, even to the point of authorizing the NMB to ignore the very statute which it was created to administer. If what the NMB did to the IAM is acceptable, it is impossible to conjure up what the Board would have to do in order to breach the "patent official bad faith" standard applied by the Circuit Court.

The Court of Appeals' decision has broad implications for collective bargaining in the nation's rail and airline industries, both of which the NMB regulates. See 45 U.S.C. § 203. The statutory bargaining process becomes a sham when the threat of self-help is eliminated. Never-

theless, that is precisely what the lower court has sanctioned here. When impasse is reached, the RLA requires a proffer of arbitration which, if not accepted, leads to a termination of mediation and the beginning of a thirty-day cooling off period. After that, Congress left the parties unrestrained in the hope that, if the threat of self-help did not lead to a settlement, the real thing would in short order. If the Mediation Board is allowed to condition its proffer of arbitration, despite the admitted existence of impasse, on the surrender of the right to strike, the statutory scheme is eviscerated.

The opinion below places restraints on a union's right to strike far beyond that contemplated by the law. Congress' injection of governmental regulation into the bargaining process was in no wise intended to eliminate the possibility that at some point economic force might be the only way to resolve the dispute. The scheme of the Act contemplates an interruption of commerce if the parties exhaust each step of the process without reaching agreement. At that point, "self-help . . . is not an evil; in fact, the threat of damaging economic warfare is essential to encourage good faith mediation." *International Association of Machinists v. National Mediation Board*, 725 F. Supp. 558, 562 (D.D.C. 1989). The Circuit Court's willingness to validate the Board's withholding of a proffer simply to prevent the union from exercising its legal right to strike undermines the entire statutory process.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 19, 1991 Decided April 12, 1991

No. 90-5201

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Appellant

v.

NATIONAL MEDIATION BOARD, *et al.*

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 90-00964)

Michael S. Wolly for Appellant.

Marc Richman, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *William Kanter*, Attorney, Department of Justice, and *Ronald M. Etters*, General Counsel, National Mediation Board, were on the brief, for Federal appellees. *R. Craig Lawrence* and *Susan A. Nellor*, Assistant United States Attorneys, entered appearances for Federal appellees.

Peter Buscemi, with whom *William J. Curtin*, *Harry A. Rissetto* and *Thomas J. O'Brien* were on the brief, for appellee National Railway Labor Conference.

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Since October 1988, appellant International Association of Machinists & Aerospace Workers ("the IAM") has participated in mediation conducted pursuant to the Railway Labor Act under the auspices of appellee National Mediation Board ("NMB" or "Board"). The Board has sought to settle a nationwide collective bargaining dispute between virtually all of the nation's rail carriers and 12 unions, including the IAM. The IAM has demanded to be released by the Board from further mediation so that it may exercise "self-help" (*i.e.*, strike). The Board has refused to release the IAM, and the IAM therefore filed suit in district court to enjoin the Board from holding it in mediation. The district court granted the Board's motion to dismiss. We affirm.

I.

A.

We have recently described in some detail the elaborate framework established by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, for resolution of labor disputes between unions and rail carriers, *see Local 808, Building Maintenance, Serv. and R.R. Workers v. NMB*, 888 F.2d 1428, 1431-33 (D.C. Cir. 1989); *see also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-80 (1969), and will summarize it only briefly. "The major purpose of Congress in passing the Railway Labor Act was to provide the machinery to prevent strikes and the resulting interruptions of interstate commerce." *International Ass'n of Machinists & Aerospace Workers v. NMB*, 425 F.2d 527, 533 (D.C. Cir. 1970) (*"IAM"*). Toward that end, "[t]he Act provides a detailed framework to facilitate the *voluntary* settlement of major disputes," *Trainmen*, 394 U.S. at 378 (emphasis added), relying heavily upon "the traditional instruments of mediation, conciliation, and arbitration," *General Comm. of Adjustment v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 332 (1943), and during whose pendency the

union may not strike and no party may alter the status quo, 45 U.S.C. §§ 152, Seventh, 155, First, 156.

A party seeking changes in pay, rules, or other working conditions must first give the other party 30 days written notice of its proposals, during which time the parties must confer on the matters raised. 45 U.S.C. § 156. Should the parties be unable to resolve the dispute through conference, either or both may invoke the services of the National Mediation Board. 45 U.S.C. § 155, First. The Board is obligated promptly to "put itself in communication with the parties" and to "use its best efforts, by mediation, to bring them to agreement." *Id.* The Act specifies no time limit on mediation. If, however, "such efforts to bring about an amicable settlement through mediation shall be unsuccessful," *id.*, the Board "shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to [binding] arbitration," which can take place, however, only if both consent. 45 U.S.C. § 155, First. If arbitration is refused by one or both parties, the Board "shall at once notify both parties in writing that its mediatory efforts have failed . . . ." *Id.* The Board may then notify the President that the dispute "threaten[s] substantially to interrupt interstate commerce," and the President may create an emergency board to investigate further and report its recommendations to the President within 30 days, 45 U.S.C. § 160.

Should the Mediation Board not so notify the President, or should the President decline to create an emergency board, the parties are free to resort to self-help. But the parties may do so only after a 30-day "cooling-off" period following the refusal to agree to arbitration. 45 U.S.C. § 155, First. And if an emergency board is created, the parties may not resort to self-help for 30 days following submission of the emergency board's report. 45 U.S.C. § 160.

It is therefore evident that the "crucial aspect of the Act['s ability to forestall strikes is] the power given to

the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969). And the real "key" is the Board's authority to hold the parties to a dispute in mediation so they cannot engage in self-help; it is "a coercive tool essential to bringing the parties to conciliation." *Local 808*, 888 F.2d at 1432, 1438.

B.

The appellant and 11 other unions set the Act's process in motion by filing notices with virtually all of the nation's rail carriers, requesting changes in wages, rules, and other working conditions. In October 1988, after 10 months of negotiations had failed to resolve the dispute, both sides requested mediation by the Board. When, after one year of mediation, the deadlock remained, all parties insisted that mediation could not break the impasse and requested that the NMB release them and proffer arbitration. The Board instead began intensified mediation, with NMB Chairman Joshua Javits directly participating, but no headway was made in four months. The IAM alleges that Chairman Javits at this point told its vice-president that "mediation had failed."

The IAM then renewed its request that the NMB release it from mediation and either proffer arbitration or notify the President so he could consider the need for an emergency board. The other 11 unions and all the railroads thereupon reached a "procedural settlement" in which the NMB concurred. Under the settlement's terms, the Board would release the parties from mediation and proffer arbitration and the President would appoint an emergency board on the conditions that: (1) the emergency board would not be bound to report within the 30-day statutory period but would instead have at least 6 months; (2) the parties would refrain from self-help until 30 days after the report issued and only at such time as

Congress was in session; and (3) the Board would conduct further mediation on certain aspects of the dispute. The Board offered the IAM the opportunity to participate and informed it that it would be held in mediation unless it accepted.

The IAM alone refused to join the settlement and sought an injunction from the district court restraining the Board from holding it in mediation. The union contended that the Board has no authority to impose conditions governing when it will release parties from mediation and that it was in any event required under the Act to release the IAM because of Javits' "admission" that mediation had been unsuccessful. The district judge, ruling orally from the bench, granted the Board's motion to dismiss.[1]

II.

The IAM is swimming up river. The scope of review of Board decisions—including determining whether the NMB acted outside of its authority in refusing to release a party from mediation—"is one of the narrowest known to the law," *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.), *amended*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988); as we recently observed, the only court to have ordered the Board to terminate

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[1] The court stated cryptically that "if the Court of Appeals wants to know the basis for my ruling, they can read the transcript. See if they can figure it out." The district court considered affidavits in making this ruling; we therefore review its decision as if it granted summary judgment in favor of the Board. *See* FED. R. CIV. P. 12(b); *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978). But the propriety of summary judgment turns here on a question of law. The IAM argues that the district court's ruling was erroneous not because there are disputed issues of fact but because the district court incorrectly in its view determined that the facts it alleged did not, as a matter of law, justify setting aside the Board's decision to hold it in mediation. We therefore think it unnecessary to read the transcript.

mediation was quickly reversed on appeal. *See Local 808*, 888 F.2d at 1433. Close judicial review of the NMB's subtle, yet necessarily freewheeling, methods could cripple the agency because "[t]he effectiveness of [its] private dispute resolution procedures depends . . . on the . . . assurance that neither party will be able to enlist the courts to further its own partisan ends." *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 411 (1989); *see also Local 808*, 888 F.2d at 1433-34. That is why we have said that we will interfere with the Board's efforts only upon a showing of "patent official bad faith," and will order the parties released from mediation only when "the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable.'" *Local 808*, 888 F.2d at 1434, (quoting *IAM*, 425 F.2d at 537).

Appellant asserts that in this case the Board has crossed this high threshold and has acted in patent bad faith. It rests this claim first on the Board's imposition of a barrier to the union's ability to strike not specifically mentioned in the statute—proposing to release it from mediation only if it agreed, along with the other unions, to the procedural settlement—and second on the Board's refusal to release it from mediation even though the Board's Chairman admitted that mediation had "failed."

Appellant makes a great deal of the unorthodox nature of the procedural agreement, even suggesting that it was somehow improper for the NMB to have consulted with the White House concerning the circumstances under which the President would set up an emergency board. We might be able to conceive of procedures or conditions that the Board could seek to impose on parties that would be outside the Board's authority, but this mixed adjudicatory-mediation scheme is not one of them. Jury-rigged it may be, but we are not entitled to prevent the Board from experimenting with any mediation device that can

fairly be said to be designed to settle a dispute without a strike and does not independently offend other laws. Indeed, the statute nowhere defines mediation. *See generally Switchmen's Union of North America v. NMB*, 320 U.S. 297, 305 (1943) (definition of terms as used in the Railway Labor Act falls within the NMB's discretion); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 462 U.S. 837, 842-43 (1989).

It thus seems quite apparent that the crux of appellant's case turns on its second proposition—that the NMB was obliged to release the IAM when Chairman Javits said that mediation failed.[2] The government points out that Chairman Javits' remarks is not necessarily attributed to the full Board. Even if it were, however, we do not think that it is a hook strong enough to hold appellant's case. To be sure, the statute states that if mediation efforts "shall be unsuccessful," the Board "shall" proffer arbitration. 45 U.S.C. § 155, First. But we do not believe that any great legal significance can be placed on the Chairman's observation that mediation "had failed." It could be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed. Congress surely expected the Board to make a judgment as to whether mediation would be unsuccessful in the future before it gave up.[3] We cannot conclude,

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[2] Counsel for appellant conceded at oral argument that the legal effect of the statement would be decisive.

[3] Moreover, we cannot see how we could find patent official bad faith solely on the basis of a statement by the Board that mediation could not in the future work. Whether mediation will eventually work is truly unknowable—one of the chief attributes of mediation is that the passage of time alone will produce an atmosphere more conducive to settlement. *See, e.g., Local 808*, 888 F.2d at 1436-38. It is thus no surprise that our review in this area has focused not on whether mediation could work but on the amount of time the Board has held a union in mediation and that we have suggested that we will order the Board to end mediation only after

based on Chairman Javits' statement, that this was a case in which there was manifest "a lack of any genuine hope or expectation that the parties will arrive at an agreement." *Local 808*, 888 F.2d at 1434 (quoting *IAM*, 425 F.2d at 537). In this case, as the government points out, the IAM's implacability might well soften, if after this hybrid procedure runs its course, a settlement between the railroads and the other 11 unions comes about. It is well recognized that the Board is entitled to use time alone to wear down an obdurate bargainer. *See Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966); *see also Local 808*, 888 F.2d at 1432, 1436-38; *International Bhd. of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1171 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973).

Accordingly, although it is possible to construe the Chairman's remark as meaning that he is giving up on mediation, we do not think it appropriate for a court to examine a Board member's statements, made in the course of mediation, so critically. Successful mediators often liberally use blarney (hoomalimali in Hawaiian) as one of their mediation tools. *See Local 808*, 888 F.2d at 1436-37. The Chairman's statement may well have been a ploy. By inquiring as to the true meaning of such a statement we could well undermine its entire purpose by forcing the Board to admit it was a tactic to spur negotiations. Thus, intrusive judicial scrutiny would likely prolong the dispute—litigation hardens the parties' positions and " 'the artificial pressure and distortion' " of an appeal to the courts further detracts from the mediatory effort. *Id.* at 1439 (quoting *IAM*, 425 F.2d at 540). For that reason, we think it inappropriate ordinarily to review statements by individual members of the Board made in the course of dealing with the parties to determine

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a theoretical time limit ("a period that is completely and patently unreasonable") has passed with no resolution. *See, e.g., Local 808*, 888 F.2d at 1434; *IAM*, 425 F.2d at 543.

whether the Board concluded or should have concluded that mediation will not be effective. Congress, presumably with these considerations in mind, required the Board to notify the parties "*in writing* that its mediatory efforts have failed" after its proffer of arbitration is refused, 45 U.S.C. § 155, First (emphasis added); it is at that point that Congress expected legal significance to attach to Board communications with the parties concerning failure of mediation (the parties may engage in self-help 30 days after receiving the written notification).

* * * *

For the foregoing reasons, the district court's dismissal is affirmed.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5201

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Appellant

v.

NATIONAL MEDIATION BOARD, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: SILBERMAN, WILLIAMS, and RANDOLPH, Circuit Judges

JUDGMENT

[Filed Apr. 12, 1991]

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Dated: April 12, 1991
Opinion for the Court filed by Circuit Judge Silberman

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

C.A. No. 90-0964 SS

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Plaintiff,

v.

NATIONAL MEDIATION BOARD
1425 K Street, NW
Washington, D.C. 20572,
Defendant.

ORDER

[Filed Jun. 29, 1990]

This matter having come before the Court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted and plaintiff's motion for preliminary and permanent injunctive relief, and the Court having found that plaintiff has failed to state a claim of patent official bad faith against defendant concerning the continuation of mediation for plaintiff's labor dispute, it is, this 29 day of June, 1990, hereby

ORDERED that plaintiff's motion for preliminary and permanent injunctive relief is denied, and further

ORDERED that defendant's motion to dismiss is granted.

/s/ Stanley Sporkin
United States District Judge

(2)

No. 91-46

Supreme Court, U.S.
FILED
SEP 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
PETITIONER

v.

NATIONAL MEDIATION BOARD AND
NATIONAL RAILWAY LABOR CONFERENCE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL RAILWAY LABOR CONFERENCE IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly declined to disturb the National Mediation Board's decision to continue mediation of petitioner's contract disputes with the nation's rail carriers, given the absence of any evidence of "patent official bad faith" in the Board's conclusion that there is a reasonable possibility that further mediation could result in a settlement.

LIST OF INTERESTED PARTIES

Respondent National Railway Labor Conference is an unincorporated trade association of the nation's major railroads. It has no parent companies or subsidiaries. The members of the NRLC are listed in the Appendix to this brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-46

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD AND NATIONAL RAILWAY LABOR CONFERENCE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT NATIONAL RAILWAY LABOR CONFERENCE IN OPPOSITION

STATEMENT OF THE CASE

Petitioner International Association of Machinists and Aerospace Workers (the "IAM") filed this action to complain about the decision by the National Mediation Board (the "NMB" or the "Board") to continue mediation of collective bargaining disputes between the IAM and the nation's rail carriers regarding, among other things, wages, work rules, and health and welfare benefits. The carriers are represented in those negotiations by a bargaining committee of respondent National Railway Labor Conference (the "NRLC").

The IAM has failed to describe adequately the procedural context in which it chose to file its lawsuit, and the relationship between this action and the recent national collective bargaining process, which involved not only the IAM but also eleven other unions that were negotiating with the nation's major rail carriers. We therefore review in some detail the origin and progress of those negotiations. This factual background strongly supports the NMB's decision to continue mediation of the disputes involving the IAM, and it thus helps to demonstrate that the lower courts' decisions are correct and review by this Court is not warranted.

A. Current Round of Negotiations

The current round of railroad negotiations started in the spring of 1988, when the IAM and eleven other unions served notices on the nation's rail carriers under Section 6 of the Railway Labor Act (the "Act"), 45 U.S.C. §§ 151-188 (1988), seeking changes in existing contractual provisions regarding wages, work rules, and health and welfare benefits. A. 35-37, 64-65.[1] The carriers promptly served Section 6 notices on the unions as well. *Id.* at 65. The notices served by the IAM and another union, the International Brotherhood of Electrical Workers (the "IBEW") were identical, and the two unions bargained jointly with the carriers. *Id.* at 7-8.

In October 1988, before the start of any substantive negotiations, the IAM notified the carriers that negotiations were at an impasse and that it would seek mediation services from the NMB pursuant to the Act.[2] A. 6,

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[1] "A." refers to the parties' appendix in the court of appeals. A copy of this appendix has been lodged with the Clerk of this Court.

[2] Active negotiations were delayed at the outset because the IAM and the IBEW filed a lawsuit challenging the NRLC's power of attorney to represent certain carriers. *International Brotherhood of Electrical Workers, et al. v. National Railway Labor Conference,*

100. The NMB docketed the mediation requests but refrained from intensive mediation so that the parties could engage in further negotiations.

Once active negotiations began in April 1989, the parties reached tentative agreements on some issues, but progress was slow on others. A. 68-69. In October 1989, the railroads and all of the unions concluded that the health and welfare negotiations had reached an impasse, and they so informed the NMB. A. 69-70; Pet. App. 4a. The Board began intensive mediation in early November 1989. A. 6, 70. NMB Chairman Joshua Javits participated directly in the mediation sessions. A. 70; Pet. App. 4a.

In February 1990, with no agreement yet in hand, the parties began to explore the possibility of submitting their disputes to a Presidential Emergency Board that would be created to address all outstanding contract issues. A. 71. On March 6, 1990, under the auspices of the NMB, the railroads and all of the unions except the IAM agreed to a comprehensive procedural proposal for resolving contract disputes on an industry-wide basis. A. 49-50. The procedural agreement anticipated the following essential features: (a) the NMB would release the parties from mediation and proffer arbitration on all issues in dispute, and the parties would decline to arbitrate; (b) the President would establish an emergency board that would investigate and report on all issues by September 15, 1990, unless more time was requested; (c) the parties would approve any reasonable request of the emergency board for more time to complete its hearings, mediation, and recommendations; (d) no party would resort to self-help until expiration of a 30-day period following release of the emergency board's final report; and (e) to give Congress an opportunity to intervene promptly in the event of a strike, no party would

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Civ. No. 88-2500-GAG (D.D.C.). The litigation was dismissed in December 1988. A. 98.

initiate self-help when Congress was not in legislative session. A. 108-109; Pet. App. 4a-5a.

Following acceptance of this agreement by the NMB, the carriers, and all unions other than the IAM, the NMB notified the participants that it was terminating mediation and proffering arbitration pursuant to 45 U.S.C. § 155 First. A. 111-114. In accordance with the procedural agreement, all participants rejected the proffer, and the NMB terminated its services to those parties. A. 116-121, 123-125. By Executive Order No. 12714, dated May 3, 1990, the President created Presidential Emergency Board ("PEB") No. 219 to consider and report on all issues in dispute. A. 73.

When the NMB, pursuant to the procedural agreement, released all unions other than the IAM from mediation, the IAM asked the Board to terminate mediation of the IAM's contract disputes as well. A. 21-25. In the IAM's case, however, there was no substitute procedure in place to fulfill the objectives of the Act, and the Board was not persuaded that further mediation would be futile. Accordingly, the NMB notified the IAM on April 5, 1990, that mediation would continue with respect to the IAM's contract disputes with the railroads. A. 26. The NMB informed the union that it would "continue to evaluate the IAM's status in the mediation process in a good faith effort to achieve the NMB's mediatory obligations under the [Act] . . . and [would] continue to re-examine the question of whether termination of statutory mediation assistance with respect to the IAM is warranted." *Id.*

B. Proceedings in the District Court

Soon after the NMB notified the IAM that mediation would continue, the IAM filed this action in the United States District Court for the District of Columbia. The IAM challenged the NMB's decision to continue mediation on two grounds. First, the IAM maintained that the procedural agreement violated the NMB's statutory dis-

cretion. Second, the IAM contended that an alleged statement by NMB Chairman Javits in February 1990, to the effect that mediation had failed, obligated the NMB to release the IAM from mediation under 45 U.S.C. § 155 First.

The IAM moved for preliminary and permanent injunctive relief, seeking to compel the NMB to terminate mediation and to proffer arbitration, thereby releasing the IAM to pursue self-help remedies. A. 11-13. The NMB opposed the IAM's motion for injunctive relief and moved to dismiss the complaint. A. 134-135. The NRLC intervened and supported the NMB's motion to dismiss. A. 200-201.

The district court granted the NMB's motion to dismiss, and denied the IAM's motion for injunctive relief. Pet. App. 11a. Relying on two leading D.C. Circuit decisions that strictly limit judicial review of NMB determinations, the district court held that the Act gives the NMB substantial discretion, and that the NMB did not abuse that discretion in deciding to continue mediation of the dispute between the IAM and the carriers. In a ruling from the bench without written opinion, the district court held that, although the IAM had no obligation to participate in the procedural agreement, neither did the NMB have any obligation to release the IAM from mediation. A. 197. The fact that other unions participating in the procedural agreement were released was not controlling, in the district court's view. Rather, the only issue was whether the NMB had properly concluded that mediation with respect to the IAM was not over. A. 193.

C. Proceedings in the Court of Appeals

The court of appeals affirmed the district court's dismissal of the IAM's complaint. Pet. App. 1a-10a. The court of appeals recognized that the scope of judicial review of NMB mediation decisions is " 'one of the narrowest known to the law.' " *Id.* at 5a, *quoting International Ass'n of*

Machinists v. Trans World Airlines, 839 F.2d 809, 811 (D.C. Cir.), *amended*, 848 F.2d 232, *cert. denied*, 488 U.S. 820 (1988) (*"Trans World Airlines"*). Only upon a showing of " 'patent official bad faith' " may a court interfere with the Board's mediation efforts. Pet. App. 6a. In the court's words, "the real 'key' [under the Railway Labor Act] is the Board's authority to hold the parties to a dispute in mediation so they cannot engage in self-help; it is a 'coercive tool essential to bringing the parties to conciliation.' " *Id.* at 4a, *quoting Local 808, Building Maintenance, Service & Railroad Workers v. NMB*, 888 F.2d 1428, 1432, 1438 (D.C. Cir. 1989) (*"Local 808"*).

The court of appeals correctly recognized that the procedural agreement between the eleven other unions and the rail carriers was a "mediation device . . . designed to settle a dispute without a strike." Pet. App. 6a-7a. The agreement did not violate any provision of the Act, and it did not offend any other law. *Id.* at 7a. Nor was the agreement imposed on reluctant participants by the NMB; the eleven unions and the railroads jointly reached the procedural agreement because it promised to help resolve their disputes. *Id.* at 4a; A. 71. The court of appeals therefore rejected the IAM's argument that the procedural agreement was "somehow improper." Pet. App. 6a.

The court then turned to the "crux" of the IAM's argument—the alleged remark by NMB Chairman Javits that mediation had failed. The court ruled that that remark is not "a hook strong enough to hold [petitioner's] case." Pet. App. 7a. The court cited five grounds for its holding.

First, the court said, the isolated remark of the Chairman cannot be attributed to the entire Board. Pet. App. 7a. Even if Mr. Javits made the alleged remark, he did not speak for the full Board, and the IAM has not even alleged that he acted with the Board's authority.

Second, the statement could have been a legitimate mediatory "ploy" uttered as "a tactic to spur negotia-

tions." Pet. App. 8a. The court of appeals ruled that it is "inappropriate ordinarily to review statements by individual members of the Board made in the course of dealing with the parties to determine whether the Board concluded or should have concluded that mediation will not be effective." *Id.* at 8a-9a.

Third, even if Mr. Javits made the alleged remark, he was merely stating the obvious—mediation up until that point in time *had been* unsuccessful. That fact, however, is not sufficient to trigger an automatic release from mediation pursuant to 45 U.S.C. § 155 First. As the court of appeals observed, the statute contemplates release from mediation only when the NMB has concluded that mediation "*shall be* unsuccessful." Pet. App. 7a (emphasis added), *quoting* 45 U.S.C. § 155 First. The Board reached no such conclusion here.

Fourth, the court of appeals ruled that, in any event, Chairman Javits' alleged statement would not be enough to justify judicial interference with the NMB's mediatory efforts, even if that statement had been meant to include future mediation. Acknowledging the extremely limited judicial review of NMB decisions, the court of appeals observed that "we cannot see how we could find patent official bad faith solely on the basis of a statement by the Board that mediation could not in the future work." Pet. App. 7a n.3. Only objective factors, such as proof of a completely unreasonable time period during which the Board has held a union in mediation without progress toward an agreement, not subjective statements of opinion by one Board member, can possibly show that the NMB has acted in patent official bad faith. *Id.*

Finally, the court held that the very existence of the procedural agreement shows the fallacy of the IAM's reading of the Chairman's remark. The procedural agreement created a very real possibility that settlement could be reached between the IAM and carriers because

"the IAM's implacability might well soften, if after [the procedural agreement] runs its course, a settlement between the railroads and the other 11 unions comes about." Pet. App. 8a. Therefore, the court rejected the IAM's contention that the Chairman's remark somehow signals " 'a lack of any genuine hope or expectation that the parties will arrive at an agreement.' " *Id., quoting International Association of Machinists v. National Mediation Board*, 425 F.2d 527, 537 (D.C. Cir. 1970) ("*IAM*").

In short, the court of appeals held that no "great legal significance" could be placed on the Chairman's remark. Pet. App. 7a. The IAM offered the court of appeals no other evidence of patent official bad faith. The court therefore affirmed the district court's decision dismissing the IAM's action.

D. Status of the PEB Procedures

While the IAM and the rail carriers were engaged in this litigation, the procedures established by the agreement among the NMB, the rail carriers, and the other unions were running their course.

In May 1990, the PEB commenced extensive hearings at which carriers and unions were given a full opportunity to express their views on the disputed labor issues. At the PEB's request, and with the agreement of the parties, the President twice extended the date for completion of the PEB's report. On January 15, 1991, the PEB issued its 94-page report, making detailed recommendations on the various issues in dispute.

The parties continued to negotiate during the 30-day period following the release of the PEB report, and they then agreed to extend that period for an additional 60 days so that negotiations could continue. Three of the participating unions reached new agreements with the carriers, but the other eight unions and the carriers failed to settle their disputes during the 90-day period following the PEB report.

On April 17, 1991, those eight unions commenced a nationwide strike. Congress promptly intervened. On the same day as the strike began, Congress moved to end it by passing H.J. Res. 222, which the President signed into law in the early morning hours of April 18, 1991. Under Pub. L. No. 102-29, 105 Stat. 169, Congress returned the striking workers to their jobs and announced that the recommendations of the PEB would be imposed as a new collective bargaining agreement between the parties, unless those recommendations were modified in proceedings before a new Special Board established by the statute, or unless the parties reached a different agreement on their own.

To give the parties an opportunity to seek clarification or modification of the PEB's recommendations, Congress directed the President to appoint a three-member Special Board to consider and rule on any such requests submitted by the parties. Congress specified a tight timetable for the Special Board's work, and it instructed the Special Board to accord a presumption of validity to the PEB's recommendations. Pub. L. No. 102-29 § 3.

On June 11, 1991, the Special Board issued its report on requests for clarification of the PEB recommendations. The Board interpreted and clarified a substantial number of the recommendations. On July 18, 1991, the Special Board issued its report on requests for modification of the PEB recommendations. The Board generally declined to disturb the PEB recommendations, as clarified. Under Sections 1(3) and 3(e) of Pub. L. No. 102-29, the PEB's recommendations, as interpreted and clarified by the Special Board, became effective as a new collective bargaining agreement at 12:01 a.m. on July 29, 1991.

ARGUMENT

Further review of the court of appeals' decision is not warranted. The court of appeals correctly upheld the district court's conclusion that the NMB had not abused its discretion in deciding to continue mediation with the IAM. The lower courts properly recognized that Congress has given the NMB extraordinarily wide latitude to resolve disputes through mediation, and that the permissible scope of judicial intervention is "one of the narrowest known to the law." In light of the IAM's failure to present any evidence of "patent official bad faith" on the part of the NMB, the court of appeals correctly refused to intervene in the mediation process. The court of appeals' decision is consistent with prior law under the Railway Labor Act, and does not conflict with any decision of this Court or the lower federal courts.

This case does not in fact raise the question that the IAM presents for review. The IAM asks whether the NMB "lawfully may insist that a union first waive its statutory right to strike before it may make use of the dispute resolution procedures available under [the Act]." But the NMB did not insist on any such waiver. None of the unions involved in the procedural agreement surrendered its right to strike. Eight of the unions that participated in the procedural agreement actually did strike, thus proving that they never relinquished that right.

Moreover, the IAM does not challenge the legal standards applied by the district court and the court of appeals. Those standards, which afford the NMB broad discretion in deciding whether to continue mediation have been well-established by this Court and the lower federal courts, and are well-suited to the NMB's statutory mandate to use mediation to help reduce the risk of crippling strikes.

Developments since the filing of the IAM's lawsuit make this case a particularly poor candidate for further

review. On July 18, 1991, the Special Board refused to modify the PEB's recommendations, and those recommendations now constitute a new collective bargaining agreement between the carriers and the unions that participated in the PEB proceedings. It is now even more likely that further mediation with the IAM will generate a resolution of the disputes involving that union. The PEB's recommendations for settlement between the parties to the procedural agreement, as adopted by Congress, may well serve as a model for a settlement between the IAM and the carriers. Judicial intervention now would merely undermine the Act's purpose of encouraging negotiated resolutions.

I. CONGRESS HAS GIVEN THE NMB EXTRAORDINARILY WIDE LATITUDE TO RESOLVE DISPUTES THROUGH MEDIATION.

The standards against which the NMB's conduct in mediation decisions should be weighed have been elaborately detailed by this Court and the lower federal courts. Remarkably, the IAM has failed even to cite, much less attempt to distinguish, several key appellate decisions in this area—*Trans World Airlines*, 839 F.2d 900, *Local 808*, 888 F.2d 1428, and *IAM*, 425 F.2d 537.

One of the central purposes of the Act is to encourage amicable settlements of contract disputes in the railroad and airline industries, so that the nation will be spared "any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 152 First. To this end, the Act establishes elaborate "machinery to prevent strikes" and the resulting interruptions of interstate commerce. *Detroit & Toledo Shore Line Railway v. United Transportation Union*, 396 U.S. 142, 149 (1969). This elaborate statutory framework is purposefully long and drawn out; indeed, the Act was designed to make the remedial scheme an "almost interminable process." *Id.* at 149; *see also IAM*, 425 F.2d at 534.

To facilitate the NMB's duty to "use its best efforts" to assist the parties in resolving a dispute, the Act scrupulously avoids prescribing the methods by which the NMB must discharge its statutory obligations. 45 U.S.C. § 155 First. Compulsory procedures would unnecessarily bind the hands of the NMB and compromise its effectiveness. *Local 808*, 888 F.2d at 1436. Thus, the Act sets no time limits within which the NMB must conclude its mediation services, and the statute gives the NMB extraordinarily wide latitude in determining when mediation has run its course. *IAM*, 425 F.2d at 540.

Because the dynamics of the mediation process are intricate and laden with subjective considerations, courts generally stay their hand rather than substitute their views for the expert judgment of a mediator. Such deference is necessary because, as this Court has recognized, "[t]he effectiveness of [the Act's] private dispute resolution procedures depends on the . . . assurance that neither party will be able to enlist the courts to further its own partisan ends." *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989).

In light of these considerations, the courts have established for NMB decisions a standard of judicial review that is "one of the narrowest known to the law." *Trans World Airlines*, 839 F.2d at 811. Only in extremely rare cases does the Act permit judicial review of NMB decisions to continue mediation over the objection of one or more parties to a labor dispute. *IAM*, decided in 1970, is the leading case concerning the discretion of the NMB to hold parties in mediation under the Act. The *IAM* court overturned a decision ordering the NMB to conclude mediation of a contract dispute to which the IAM, petitioner here, was a party. The court held that jurisdiction to scrutinize NMB decisions is highly circumscribed, and that courts must exercise "utmost restraint" before de-

ciding to terminate a process that the NMB itself has not terminated. 425 F.2d at 537.

A reviewing court has jurisdiction to provide a remedy only "if the Board continues mediation on a basis that is *completely and patently arbitrary* and for a period of time that is *completely and patently unreasonable*, notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement." 425 F.2d at 537 (emphasis added). The NMB "is entitled to as strong a presumption as the legislature," *id.* at 540, because a "vigorous presumption of validity" shields the NMB from the "resentment or pique" of combatants in a labor dispute and truly confines judicial review to the most "extraordinary and exceptional situation." *Id.* at 542, 543.

The extremely limited authority of courts to review NMB mediation decisions is demonstrated by the stringent standards courts have used in applying the broad principles described above. A reviewing court, for example, may "rely only on . . . *objective data*," not the subjective opinions or conclusory suppositions of parties that have become embittered during the course of protracted negotiations or frustrated by perceived mediation delays. *IAM*, 425 F.2d at 540 (emphasis added). "Absent a showing of *patent official bad faith*, a court has no authority to review the Board's decision to keep a dispute in mediation." *Local 808*, 888 F.2d at 1434 (emphasis added). Moreover, during judicial review of NMB mediation decisions, no second-guessing is permitted. *Id.* at 1436. The NMB must be given "the benefit of any doubt" and "if any state of facts might be supposed that would support its action, those facts must be presumed to exist." *IAM*, 425 F.2d at 540. The IAM does not challenge any of these principles here.

The crucial inquiry is "whether there is a reasonable possibility of conditions and circumstances (including attitudes and developments) . . . sufficient to justify the

Board's judgment that the possibility of settlement is strong enough to warrant continuation of the mediation process." *IAM*, 425 F.2d at 541. This Court has approved of the burdens imposed on a party seeking review of NMB mediation determinations because "[t]he concept of mediation is the antithesis of justiciability." *General Comm. of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 337 (1943).

II. THE NMB ACTED WELL WITHIN ITS DISCRETION IN DECIDING TO CONTINUE MEDIATION WITH THE IAM

The IAM fails to present any objective facts from which this Court could find that the NMB acted with "patent official bad faith." Petitioner relies almost entirely on NMB Chairman Javits' alleged remark that "mediation had failed."[3] Pet. App. 4a. Assuming that the statement was actually made, the IAM misconceives its legal effect.

First, the remark, standing alone, is insufficient to establish patent official bad faith. A reviewing court may "rely only on . . . objective data," not the subjective opinions or conclusory suppositions of one member of the NMB during the course of protracted mediation. *IAM*, 425 F.2d at 540; *see also Local 808*, 888 F.2d at 1435-1437. As Judge Leventhal explained in *IAM*, any judicial inquiry that goes beyond the objective facts and seeks to explore the NMB's reasoning would be "destructive of the mediation process in general, including future cases not yet born." *IAM*, 425 F.2d at 540. When the objective facts are examined in this case, the conclusion is inescapable that the NMB acted properly.

Second, even if a court could determine whether the NMB had acted in patent official bad faith based solely

[3] Counsel for the IAM conceded at oral argument before the court of appeals that the legal effect of this statement would be decisive. Pet. App. 7a n.3.

on an alleged statement by one member of the Board, the fact that there are plausible alternative explanations for the statement in question would preclude such a determination in this case. The remark may well have been a legitimate mediatory "ploy" uttered as a "tactic to spur negotiations." Pet. App. 8a. Furthermore, the Act permits the NMB to terminate mediation and proffer arbitration only if mediatory efforts "shall be unsuccessful." 45 U.S.C. § 155 First. Chairman Javits' statement refers only to the present state of mediation, and is not a prognosis of future success or failure: "It could be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed." Pet. App. 7a.

In these circumstances, the courts below were obliged to reject the IAM's position because "if any state of facts might be supposed that would support [the NMB's] action, those facts must be presumed to exist." *IAM*, 425 F.2d at 540.

Nor can the IAM hope to show patent official bad faith by relying on the existence of the procedural agreement itself. The procedural agreement was a proper attempt by the NMB to "use its best efforts, by mediation, to bring [the parties] to agreement." 45 U.S.C. § 155 First. This "mediation device" was well within the NMB's discretion, and furthered the Act's goal of "settl[ing] a dispute without a strike." Pet. App. 6a, 7a. It in no way violates any provision of the Act, and does not "offend other laws." *Id.* at 7a. As the court of appeals stressed in *Local 808*, mediation is "an art-form." 888 F.2d at 1436. The Act "nowhere defines mediation" because to do so would unnecessarily prevent the NMB from developing creative devices for bringing recalcitrant parties to the negotiating table. Pet. App. 7a.

The procedural agreement was purely voluntary. No railroad or union was forced to enter the agreement. The

IAM chose not to participate in the industry-wide agreement, as it had every right to do. The NMB, in turn, chose not to release the IAM from mediation, as it had every right to do. This is precisely the basis on which the district court rejected the IAM's complaint. A. 197.

III. THE NMB'S DECISION TO CONTINUE MEDIATION WITH THE IAM WAS PROPER BECAUSE ADDITIONAL MEDIATION MAY WELL PROVE TO BE SUCCESSFUL

By agreeing to the appointment of a PEB that would be given adequate time to investigate and report on all disputed collective bargaining issues in national negotiations, the participants in the procedural agreement created a real prospect for an industry-wide resolution of existing disputes. It has frequently been the case in the railroad industry that, when the carriers have reached agreement with one or more unions on a particular bargaining issue, that agreement has served as a model for agreements on the same issue with other unions that remain in negotiations. This process, known as "pattern bargaining," has been particularly common on issues as to which the unions or the carriers have urged the adoption of industry-wide, or nearly industry-wide, agreements. A. 59.

Thus, in April 1990 when the NMB notified the IAM that it would not terminate mediation, there was a very real possibility that the procedural agreement would lead to settlements between the carriers and the other railroad unions and that, against the background of such settlements, future mediation with the IAM would be fruitful. On that ground alone, the NMB's decision was properly upheld. *IAM*, 425 F.2d at 541 (NMB needs only "reasonable possibility" of a settlement); *International Association of Machinists v. NMB*, 725 F. Supp. 558, 562 (D.D.C. 1989) (NMB decision upheld "because the prospect for a voluntary settlement remains").

Now, of course, by virtue of Pub. L. No. 102-29, a resolution has in fact been reached with respect to all the parties to the procedural agreement. On July 18, 1991, the Special Board upheld the recommendations made in the PEB's January 15 report. On July 29, 1991, those recommendations became binding on the parties to the procedural agreement "as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.)." Pub. L. No. 102-29 §§ 1(3), 3(e).

The contract terms established under Pub. L. No. 102-29 address virtually all of the issues that divide the IAM and the carriers. In its complaint, the IAM affirmatively alleged that its bargaining positions and those of the IBEW, one of the unions directly affected by the PEB recommendations, were identical. A. 7-8. The fact that the IBEW and the other railroad unions have come to terms with the railroads enhances the prospects that those terms will play a significant role in further mediation between the IAM and the carriers. There is a substantial possibility, therefore, that further mediation could bring about a settlement involving the IAM. The NMB should not be compelled to release the IAM from mediation before that process is given a chance to forge a settlement based on Pub. L. No. 102-29 and the report of the PEB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 9, 1991

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APPENDIX

APPENDIX

APPENDIX

NATIONAL RAILWAY LABOR CONFERENCE MEMBERS

Akron and Barberton Belt
Alaska Railroad
Alton & Southern
Atchison, Topeka & Santa Fe
Atlanta & St. Andrews Bay

Bangor & Aroostook
Belt Railway of Chicago
Bessemer & Lake Erie
Birmingham Southern
Burlington Northern

Canas Prairie
Canadian National Lines in U.S.
Canadian Pacific Lines in U.S.
Central Vermont
Chicago & Illinois Midland
Chicago & North Western Transportation
Chicago Short Line
Chicago South Shore & South Bend
Chicago, West Pullman & Southern
Colorado & Wyoming
Columbia & Cowlitz
Consolidated Rail Corporation
CSX Transportation, Inc.

Davenport, Rock Island & North Western
Denver & Rio Grande Western
Denver Union Terminal
Detroit & Mackinac
Duluth, Missabe & Iron Range
Duluth, Winnipeg & Pacific

East Erie Commercial
Elgin, Joliet & Eastern

Grand Trunk Western

Houston Belt & Terminal

Illinois Central Railroad
Indiana Harbor Belt

Kansas City Southern-Louisiana & Arkansas
Kansas City Terminal

Lake Superior & Ishpeming
Lake Terminal
Long Island Rail Road
Longview, Portland & Northern
Los Angeles Junction

Manufacturers Railway Co.
Meridian & Bigbee
Metro-North Commuter Rail
Minnesota, Dakota & Western
Mississippi Export
Missouri Pacific
Monongahela
Monongahela Connecting

National Railroad Passenger Corporation
New Jersey Transit Rail Operations, Inc.
New Orleans Public Belt
New Orleans Union Passenger Terminal
Norfolk & Portsmouth Belt Line
Norfolk & Western
Norfolk Southern Corp.
Norfolk Southern Railway
Northern Indiana Commuter Trans. Dist.
Northwestern Pacific

Ogden Union Railway & Depot

Peoria & Pekin Union
Philadelphia, Bethlehem & New England
Pittsburg & Shawmut
Pittsburgh & Lake Erie
Pittsburgh & Ohio Valley

Pittsburgh, Chartiers & Youghiogheny
Port Authority Trans-Hudson
Portland Terminal Railroad
Port Terminal Railroad Association
Providence & Worcester

Richmond, Fredericksburg & Potomac
    Acca Yard
    Potomac Yard

St. Louis Southwestern
Soo Line
Southern Pacific

Terminal Railway, Alabama State Docks
Terminal Railroad Association of St. Louis
Texas Mexican

Union Pacific
Union Railroad (Pittsburgh)

Wichita Terminal Association

Youngstown and Southern

(3)

No. 91-46

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Mediation Board's refusal to release petitioner from mediation violated the Railway Labor Act, 45 U.S.C. 151 *et seq.*

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In the Supreme Court of the United States

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 930 F.2d 45.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1991. The petition for a writ of certiorari was filed on July 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).[1]

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[1] In addition to the parties named in the caption, the National Railway Labor Conference, which represents the railroads and was an appellee below, is a respondent in this Court.

STATEMENT

1. In the Railway Labor Act, 45 U.S.C. 151 *et seq.*, Congress created the National Mediation Board (NMB or Board) and vested it with broad discretion to mediate labor disputes in the railroad and airline industries. Petitioner brought this action seeking to overturn the NMB's decision not to release petitioner from mediation, thereby postponing petitioner's ability to engage in a strike against the railroads whose employees it represents.

2. Railroad industry employees became organized earlier than employees in many other industries, and the labor relations problems of the railroad industry had a particularly great impact upon interstate commerce. See generally *Pennsylvania R.R.* v. *Railroad Labor Board*, 261 U.S. 72 (1923); *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937). Beginning with the Arbitration Act of 1888, ch. 1063, 25 Stat. 501, and culminating with the enactment of the Railway Labor Act (RLA) in 1926, Congress enacted specific statutes to address labor relations problems in the railroad industry. See *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 328-329 & n.3 (1943).

The central purpose of the RLA is to avoid strikes and management actions that could lead to strikes. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 148-149 (1969). Unlike the National Labor Relations Act, 29 U.S.C. 151-168, and other federal statutes that limit the way in which strikes, lockouts, and other labor actions can be conducted, the RLA does not prescribe rules governing the nature of self-help. Rather, the RLA attempts to avoid interruptions of interstate commerce by establishing a machinery of mediation and conciliation.

396 U.S. at 150. The RLA achieves this goal by establishing what may be a prolonged procedure, which has been described by this Court as "an almost interminable process." *Id.* at 149.

To avoid interruptions of interstate commerce, the Act imposes upon the parties an obligation to "exert every reasonable effort" to negotiate a settlement, 45 U.S.C. 152 First, and provides a detailed framework to facilitate voluntary settlement of "major disputes." [2] Generally, the RLA requires the parties to resolve their differences themselves, and, if that process fails, the NMB may mediate the dispute. This Court has summarized the procedure:

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7.

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

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[2] The Act divides railroad labor-management disputes into "major" and "minor" disputes, and treats each kind differently. "Major" disputes, of which this matter is an example, are those that involve creating or changing collective bargaining agreements. "Minor" disputes involve such issues as the interpretation of collective bargaining agreements. Minor disputes are subject to compulsory arbitration by the National Railroad Adjustment Board or another statutory alternative. See 45 U.S.C. 153. Major disputes are resolved in the manner outlined in the text.

The coercive provisions of this procedure are contained in Sections 5 and 6 of the Act, 45 U.S.C. 155 and 156, which provide that neither party may engage in self-help until 30 days after a party has declined the Board's proffer of arbitration. See *Shore Line*, 396 U.S. at 150. The NMB's primary statutory power over the process of mediation, therefore, is the authority to determine whether and when to release the parties from mediation by proffering arbitration. If the Board determines that mediation will not be successful, it will proffer arbitration; and if the parties do not agree to binding arbitration, they may then engage in self-help, including strikes and lockouts, with all the potential disruption that may follow.

Self-help activities can be further delayed if the NMB determines that a dispute threatens to substantially interrupt interstate commerce by depriving a section of the country of essential transportation service. Upon a notification of such a threat from the NMB, the President may, in the exercise of his discretion, appoint an Emergency Board to investigate the dispute and report to the President. RLA § 10, 45 U.S.C. 160. The Emergency Board is given thirty days to investigate the dispute and report its findings to the President. During this time period, and for an additional thirty day "cooling-off" period after submission of the Emergency Board's report, the parties are required to observe the *status quo*, unless they mutually agree to new terms. *Ibid.* The procedures of the RLA end only after the completion of these steps; it is at that point that the parties are free to engage in self-help activities.[3]

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[3] Conclusion of the RLA procedures does not necessarily terminate efforts by the government to settle the dispute and

3. The National Mediation Board is the fulcrum of the mediation and conciliation process. Consequently, Congress took "great pains" to avoid any impairment of the NMB's usefulness in settling disputes. *Switchmen's Union* v. *NMB*, 320 U.S. 297, 303 (1943). One of these protections is that the NMB, unlike other federal agencies, does not "make findings, or even statements to the public, for these would undercut its status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future." *International Ass'n of Machinists & Aerospace Workers* v. *NMB*, 425 F.2d 527, 539 (D.C. Cir. 1970). The NMB's regulations require the Board and its employees to preserve the confidentiality of communications received in the mediation process, as well as all records referring to that process. 29 C.F.R. 1208.3, 1208.5. Recognizing the unique role of the mediator, courts have similarly held that the NMB cannot be required to provide information about its mediation activities other than the "objective facts" of the dispute and mediation. *Local 808, Building Maintenance, Serv. & R.R. Workers* v. *NMB*, 888

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avoid the disruption to interstate commerce that would follow a rail strike of any magnitude. In the past, Congress has intervened in particular disputes through legislation, either by creating extended cooling-off periods beyond those contained in the RLA, or by imposing the terms of a settlement on the parties. See, *e.g.*, *Wilson* v. *New*, 243 U.S. 332, 340-343 (1917); *Maine Central R.R.* v. *Brotherhood of Maintenance of Way Employees*, 873 F.2d 425, 426-428 (1st Cir. 1989). See also Pub. L. No. 90-10, 81 Stat. 12 (1967); Pub. L. No. 99-385, § 1, 100 Stat. 819 (1986); Pub. L. No. 100-429, § 1, 102 Stat. 1617 (1988).

F.2d 1428, 1435 (D.C. Cir. 1989); *Machinists*, 425 F.2d at 540.[4]

4. This action arose out of a nationwide collective bargaining dispute involving virtually all of the nation's major rail carriers and 12 unions, including petitioner. Pet. App. 4a. Petitioner began its part in the labor dispute on January 20, 1988, by serving notice under Section 6 of the RLA of its intent to seek changes in certain rules and working conditions. C.A. App. 5. The railroads, represented by the National Carriers Conference Committee, served counter-notices. C.A. App. 5-6.

After a period of negotiations between the parties, both sides, in October 1988, requested mediation by the Board. Pet. App. 4a. In October 1989, the rail-

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[4] The discussion of the facts in this brief is, accordingly, based on the bare allegations of the complaint. Although the Board accepts the allegations of the complaint for present purposes, it does not accept the accuracy or completeness of those allegations for other purposes.

We note, however, that petitioner's "Statement of Material Facts As To Which There Is No Genuine Issue" (C.A. App. 136) contains various allegations. Because the district court granted the NMB's motion to dismiss—and because it was unnecessary for purposes of that motion—the Board has not replied to that Statement, or even filed an Answer to the Complaint. The Board does not accept the allegations in the Statement or in the Declarations filed by petitioner's officers (C.A. App. 14-19, 27-33). Prior similar allegations have not been answered because the NMB has determined that it "would not contribute positively to the mediatory process" to issue a "detailed rebuttal" to petitioner's statements regarding private discussions between Chairman Javits and petitioner's officers. C.A. App. 26. Under the circumstances, petitioner's statement (Pet. 8) that Chairman Javits "unashamedly admitted" that petitioner's refusal to waive its right to strike formed the basis for the Board's refusal to proffer arbitration is clearly inappropriate.

roads and the unions advised the NMB that negotiations were at an unbreakable impasse and requested a proffer of arbitration. The NMB refused, but it intensified mediation, with direct participation by NMB Chairman Javits. In February 1990, Chairman Javits allegedly "admitted to the parties" that mediation "had failed to resolve the dispute." Pet. App. 4a; C.A. App. 6.[5]

On February 21, 1990, petitioner asked the NMB to terminate mediation and proffer arbitration to the parties. While this request was under consideration, the railroads and 11 of the unions that are parties to this national dispute—all except petitioner—entered into a procedural agreement on March 6, 1990, to take several steps to attempt to resolve this labor dispute.

Under the procedural agreement, the unions and the railroads agreed (1) that the Emergency Board should proceed with an investigation of the issues concerning health and welfare, and wages and rules, in that order; and (2) that the parties would request the Emergency Board to issue its report and recommendations by September 15, 1990 (or a later date, if necessary). They further agreed that the NMB should conduct additional mediation of issues concerning wages and rules.[6] The agreement contem-

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[5] In keeping with the Board's longstanding practice of not commenting on statements made in mediation, this alleged statement by Chairman Javits has neither been confirmed nor denied by the NMB. However, respondent National Railway Labor Conference denied the allegation below. C.A. App. 130, para. 9.

[6] Even when the mediation process of the RLA has concluded, the NMB will often make its services available to parties requesting them on a purely voluntary basis. In addi-

plated extensions of the *status quo* independent of those required by the RLA; the parties undertook not to engage in self-help until the expiration of the statutory cooling-off period following the Emergency Board's report, and in no event to initiate self-help at any time Congress was not in session. On April 2, 1990, the NMB proffered arbitration to the railroads and the 11 unions that had joined this agreement, thus releasing them from further statutorily mandated mediation. Pet. App. 4a-5a; C.A. App. 8, 30, 108-109.[7]

Petitioner was the only party to the national dispute that did not enter into an agreement with the railroads to continue settlement efforts before the NMB and an Emergency Board. The NMB did not—and has not yet—released petitioner from mediation. Pet. App. 4a-5a.

5. Petitioner filed this lawsuit on April 25, 1990 (C.A. App. 2), a little more than two months after it asked the NMB to proffer arbitration. The NMB moved to dismiss for failure to state a claim upon which relief could be granted, and the district court dismissed the action. Pet. App. 5a; C.A. App. 134,

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tion, the NMB is authorized to proffer its services whenever a labor emergency exists. RLA § 5 First, 45 U.S.C. 155 First.

[7] On May 3, 1990, President Bush issued an Executive Order (E.O. 12714) convening an Emergency Board to examine the railroad industry collective bargaining dispute. 26 *Weekly Comp. Pres. Doc.* 713-714 (May 4, 1990). The Emergency Board issued its report on January 15, 1991. On April 18, 1991, Congress enacted Pub. L. No. 102-29, 105 Stat. 169, a procedure by which a "Special Board" would be appointed to hear exceptions to the report of the Emergency Board, with the unexcepted recommendations to take effect as if agreed to by the parties. The final reports of the Special Board were issued on July 18, 1991.

199. Although it did not issue a written opinion, the district court observed from the bench that the Board is "not prepared to say at this time * * * that the mediation efforts with respect to [petitioner] are at an impasse," and that the "Board is not obliged to terminate the mediation." C.A. App. 193, 197.

6. The court of appeals affirmed. The court first noted the narrow scope of review, requiring a showing of "patent official bad faith" and reflecting "one of the narrowest [standards] known to the law." Pet. App. 5a-6a. Under this standard, the NMB can be ordered to release a party from mediation only if "the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable." *Id.* at 6a.

The court of appeals rejected petitioner's claim that the Board's actions reflected "patent bad faith." Pet. App. 6a. The court first disagreed with petitioner's contention that the NMB's bad faith was established by the circumstances regarding the agreement between the other unions and the railroads, including petitioner's suggestion that it was "somehow improper" for the Board to have allegedly consulted with the White House concerning the conditions under which the President would set up an emergency board. *Id.* at 6a-7a.[8]

The court then rejected petitioner's argument—which petitioner had conceded to be "decisive" (Pet. App. 7a n.2)—that patent bad faith was established by NMB Chairman Javits' alleged statement that mediation had failed. The court noted that "[i]t could

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[8] The NMB has never stated whether it did or did not consult with the White House, although it would not have been improper if it had. See page 16 *infra*.

be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed." *Id.* at 7a. But "Congress surely expected the Board to make a judgment as to whether mediation would be unsuccessful *in the future*," before the Board gave up on mediation. *Ibid.* (emphasis added). The court found no basis to conclude that the NMB had given up hope that mediation would still succeed. The court noted that any statement by Chairman Javits that mediation had failed could have been a mediatory "tactic to spur negotiations." *Id.* at 8a.

In addition, the court noted that, because "intrusive judicial scrutiny [of mediation] would likely prolong the dispute," it is "inappropriate ordinarily to review statements by individual members of the Board made in the course of dealing with the parties to determine whether the Board concluded or should have concluded that mediation will not be effective." Pet. App. 8a-9a. The court observed that "Congress, presumably with these considerations in mind, required the Board to notify the parties '*in writing* that its mediatory efforts have failed' after its proffer of arbitration is refused * * *; it is at that point that Congress expected legal significance to attach to Board communications with the parties concerning failure of mediation." *Id.* at 9a.[9]

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[9] Because the district court considered affidavits, the court of appeals treated its decision as a grant of summary judgment in favor of the Board. Pet. App. 5a n.1.

ARGUMENT

Petitioner contends that the Board should have proffered arbitration and released it from mediation. Pet. 7. Petitioner does not argue that the court of appeals applied an incorrect legal standard; rather, petitioner disagrees with that court's application of the "patent official bad faith" standard. Pet. 8. Petitioner also does not—and could not—argue that the court of appeals' decision conflicts with the decision of any other court. Petitioner thus challenges the court of appeals' case-specific application of a settled legal standard. As a result, petitioner's claim does not warrant review; petitioner's position is, in any event, plainly incorrect.

The governing legal standard is clear. "Absent a showing of patent official bad faith, a court has no authority to review the Board's decision to keep a dispute in mediation." *Local 808*, 888 F.2d at 1434. Any possible remedy would be available only in an "extraordinary and exceptional" case, "if the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement." *Machinists*, 425 F.2d at 537, 543. The burden petitioner must carry in order to overturn the NMB's refusal to proffer arbitration is exceedingly heavy. As this Court has explained:

> The RLA provides an exhaustively detailed procedural framework "to facilitate the voluntary settlement of major disputes." * * * The effectiveness of these private dispute resolution procedures depends * * * on the * * * assurance that neither party will be able to enlist the courts to further its own partisan ends.

Trans World Airlines, Inc. v. *Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989).[10]

Petitioner raises a series of objections to the Board's decision not to release it from mediation; none is tenable, and none merits review.

1. Petitioner suggests that it has been unjustifiably singled out for special treatment because it refused to join the procedural agreement entered into by all other parties to the dispute. Pet. 7-8. But while the remaining 11 unions and the railroads in these negotiations have been formally released from mediation, they have been released under circumstances that guarantee further settlement activities under the auspices of the Presidential Emergency Board and further voluntary mediation by the NMB. In effect, statutory mediation to those parties was

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[10] The need for judicial reluctance to intervene in mediation has been repeatedly reiterated. See, *e.g.*, *Local 808*, 888 F.2d at 1436-1437 (Mediation is an "art-form" which "relies heavily on personal powers of persuasion, not adjudication" and which makes it "extremely difficult * * * to measure a mediator's actions in any given negotiation"); *Delaware & Hudson Ry.* v. *United Transp. Union*, 450 F.2d 603, 608 (D.C. Cir.) (the NMB's role is "so sensitive and critical that ordinary doctrines permitting judicial action on a complaint of arbitrary delay and protraction" are insufficient), cert. denied, 403 U.S. 911 (1971); *Machinists*, 425 F.2d at 539 (Reviewing court "must take care to avoid a broad beam of light that destroys a photograph still in process of development.").

Because this case falls far short of the standard of "patent official bad faith," we do not address the question left open in *Delaware & Hudson*, *supra*, whether jurisdiction to review the Board's decision exists "at all." 450 F.2d at 608. As we explained in the lower court, however, it is the Board's position that no such jurisdiction exists. See Gov't C.A. Br. 16 n.10.

transcended—not by resolution of the underlying dispute, but by an arrangement whereby the unions and railroads have agreed to maintain the *status quo* and submit to a form of non-binding arbitration by a blue-ribbon panel, under the watchful eye of Congress, which has acted to intervene in national labor disputes in the past. See note 3, *supra*.

Thus, all parties to the negotiations, save petitioner, agreed that an Emergency Board should be created to review outstanding issues. All parties, save petitioner, agreed that the Emergency Board should first examine and report on health and welfare issues, and then on wage and rules issues. All parties, save petitioner, requested the NMB to continue mediation on wages and rules. All parties, save petitioner, agreed to extend the time period for the Emergency Board to make its investigation and produce its reports, if necessary. All parties, save petitioner, agreed that self-help would not be employed until after a 30-day cooling-off period, and in no event when Congress is out of session.

In contrast, petitioner unilaterally insists on a release from mediation and all RLA processes. Thus, while all the other parties indicated their willingness to continue to seek a resolution of their differences in an arbitration-like setting without resort to self-help, petitioner has declined to join that process. This difference clearly provides objective facts that justify the NMB's decision to treat petitioner differently and to retain petitioner, along with the railroads it is negotiating with, in mediation. As was stated in *Local 808*, 888 F.2d at 1440:

> Often a mediator will let an unusually stubborn party sit with the status quo in place until the party is ready to negotiate seriously, knowing

> that the outcome in other mediations may influence the parties in a related dispute. This is a basic tactic in mediation * * *.

The court of appeals correctly concluded (Pet. App. 8a) that it is likely the potential resolution of various issues by the other unions will influence the resolution of petitioner's disputes. Moreover, that prospect could well spur petitioner to seriously consider settling its disputes in mediation, lest events overtake it. The Board's decision to employ this "basic tactic in mediation" thus is clearly permissible.

Furthermore, other possible sets of facts exist to justify the NMB's decision not to release petitioner from mediation. Petitioner, alone among the many parties to this dispute, now insists that an impasse has been reached and that further settlement efforts are pointless. However sincerely felt, this pronouncement must be viewed skeptically, for a "party that brings a court action may well acquire a stake in showing that mediation won't work." *Machinists*, 425 F.2d at 542. In its request for a proffer of arbitration, moreover, petitioner itself characterized the impasse as "seemingly" insurmountable. C.A. App. 21. A court's function is limited to determining whether successful mediation is at all possible, based on objective facts, no matter how skeptical it may be of a successful result. *Machinists*, 425 F.2d at 541.

In so doing, a court must consider that the NMB may be aware that one or more parties has more flexibility than indicated publicly. While skillful negotiators will portray their latest offer as their final one, the NMB may be more knowledgeable of the party's actual position. As the D.C. Circuit has observed, "[t]he Board will always know things about the parties and their dispute that the court does not

know and can never know." *Local 808*, 888 F.2d at 1436.[11]

Finally, even if petitioner and the other parties had reached their bottom-line negotiating positions, part of the purpose and design of the RLA is to allow the erosive force of time to soften seemingly rigid bargaining positions. *Shore Line*, 396 U.S. at 149-150. Again, the mere fact that the remaining parties have agreed to further proceedings before an Emergency Board and the NMB provides an objective basis for concluding that the impasse seen by petitioner either does not yet exist or has already been broken. Petitioner and the railroads it is negotiating with cannot be oblivious to the Emergency Board and subsequent proceedings.

2. Petitioner also suggests that the Board's decision not to release it from mediation should be overturned because of the Board's alleged role in the procedural agreement reached by the other parties to the negotiations. Pet. 7-8. Petitioner seems to suggest that the procedural agreement is somehow violative of

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[11] Similarly, a perceived impasse may exist only because a party has yet to engage in negotiations on important issues. Petitioner's own submissions suggest that this possibility is grounded in objective fact. According to petitioner, the railroads had, up to the time of the complaint, refused to negotiate wage and rules issues until all issues concerning health insurance were resolved. C.A. App. 28-29. Under the procedural agreement, however, the parties stipulated to a process in which all issues, including wages and rules, would be investigated by the Emergency Board, and wages and rules were to be the subject of NMB voluntary mediation. Although petitioner's participation in mediation would be separate from and parallel to the Emergency Board proceedings and voluntary NMB mediation, there is no reason to believe mediation here will not be fruitful, as progress on one front influences proceedings on the other.

the RLA and that it would have been somehow improper for the NMB to ascertain the views of the White House regarding whether the President would exercise his discretion to appoint an Emergency Board. Neither contention can support petitioner's claim that the NMB has acted in patent official bad faith.

The procedural agreement is consistent with the intent of the RLA. Petitioner's failure to point to any specific provision of the RLA allegedly violated by the procedural agreement is not surprising, for there is none. In fact, the RLA places an affirmative duty on the unions and the railroads "to exert every reasonable effort to make and maintain agreements." § 2 First, 45 U.S.C. 152 First. This provision imposes an affirmative obligation on the parties. *Chicago & N.W. R.R.* v. *United Transp. Union*, 402 U.S. 570, 577 (1971); *Shore Line*, 396 U.S. at 151-152. The procedural agreement represents the implementation of that affirmative duty in this case. While the RLA creates the lengthy processes before the NMB and potential Emergency Boards, the parties always retain the authority to reach agreements at any stage. RLA § 2 Second, 45 U.S.C. 152 Second (party representatives required to engage in conferences); § 10, 45 U.S.C. 160 (parties may agree to alter *status quo* even during Emergency Board investigation).

More fundamentally, the procedural agreement is entirely consistent with the basic purposes of the RLA. "The major purpose of Congress in passing the Railway Labor Act was to 'provide the machinery to prevent strikes' and the resulting interruptions of interstate commerce." *Machinists*, 425 F.2d at 533, quoting *Shore Line*, 396 U.S. at 148. See also 45 U.S.C. 151a. The procedural agreement obviously

furthers this fundamental goal of the RLA by creating a mutually agreed, arbitration-like procedure to continue efforts at settling this national rail dispute, and may avoid the serious economic disruption that would surely follow from a national rail shutdown.

Nor would there be any impropriety in the NMB's insuring that the President is informed of the parties' positions and ascertaining the willingness of the President to appoint an Emergency Board. The President is not required to create an Emergency Board. 45 U.S.C. 160. Certainly it would be legitimate, for example, for the NMB to determine, as a settlement tactic, that the parties should move to another venue, such as an Emergency Board, thereby creating pressures for settlement. Obviously, were the NMB to contemplate such a step, it would be entirely appropriate for it to ascertain the President's willingness to appoint an Emergency Board.

Furthermore, although the roles of the NMB and the President in RLA procedures may be technically separate, the President's indicated willingness, or lack of willingness, to appoint an Emergency Board if mediation were to fail could well affect mediation and the parties' positions. For example, if the President indicated he would be unwilling to appoint an Emergency Board, it could influence the mediatory position, say, of a union that had threatened to strike, but was not really prepared to do so. A union in that position might lose face if it did not strike as soon as it was allowed. Thus, ascertaining the President's possible response if mediation were to fail would be a legitimate mediatory tactic.[12]

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[12] To the extent that petitioner seeks to attack the procedural agreement itself (see Pet. 7), we agree with the dis-

3. Citing the NMB's duty to proffer arbitration if its "efforts to bring about an amicable settlement through mediation shall be unsuccessful," RLA § 5 First, 45 U.S.C. 155 First, petitioner (Pet. 7) contends that the Board had no statutory authority to delay the proffer of arbitration to petitioner. The essential premise of petitioner's position is that the Board has impermissibly conditioned petitioner's release from mediation, which petitioner terms as "failed," upon petitioner's "waiver" of its asserted right to immediate self-help. This argument, however, assumes the ultimate issue, i.e., that mediation has failed. The objective facts, including the other parties' agreement to negotiate the wage and rules issues which had, according to petitioner, eluded discussion to date, demonstrate the opposite.

The only evidence petitioner offers to show that mediation has failed is its understanding of Chairman Javits' alleged remarks. Pet. 3, 7. As the court of appeals found, even if these isolated remarks were made, they would be insufficient to support petitioner's claim. This determination is particularly compelling in light of the events subsequent to the date when the Chairman's statement was allegedly made. Since that time, the remaining parties commenced the voluntary efforts to achieve a settlement, which impose new mediatory pressures upon petitioner. These drastically changed circumstances rendered inoperable any conclusions that might previously have been made by the Chairman.

Furthermore, the fact that the NMB's Chairman may have expressed a view that mediation had been unsuccessful as of February 1990, is simply insuffi-

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trict court's suggestion that petitioner lacks standing to do so. See C.A. App. 193.

cient to carry petitioner's burden of proving patent official bad faith. Assuming such a statement was made, it cannot be transmogrified, as petitioner attempts to do, into an admission that the Chairman had determined that mediation would never succeed and had to be terminated. Cf. *Local 808*, 888 F.2d at 1441. Clearly, as the court below concluded (Pet. App. 8a), it is a legitimate tactic for a mediator to threaten to end discussions in an effort to spur a reluctant party to negotiate seriously. Just as "[a]n NMB member may legitimately indicate an unwillingness to move a dispute out of mediation in order to pressure the parties to settle," *Local 808* 888 F.2d at 1441, so may the NMB legitimately threaten to halt mediation, thereby threatening to move the parties to a different plain with different pressures working toward settlement.

Moreover, even if the Chairman's alleged statements reflected more than mediatory tactics, he is only one of three Board members, and his statements cannot bind the Board. Even if he "admitted" that mediation had failed, that could not be attributed to the other Board Members or the Board as a whole. Petitioner's attribution of the Chairman's alleged statements to "the Board" (Pet. 7) is both factually and legally incorrect.[13] The court of appeals properly refused to give legal significance to these alleged remarks.

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[13] Whether further mediation is likely to be unsuccessful is determined by a vote of the Members of the NMB, and it is the Board's longstanding policy to notify the parties in writing when it concludes that mediation "shall be unsuccessful." 45 U.S.C. 155, First. Neither event occurred here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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